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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Curtis Turbyfill,

Petitioner,

v.

United States of America

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner, CURTIS TURBYFILL, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on February 27, 1981.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the action of the United States Court of Appeals for the Sixth Circuit, in upholding the trial court's denial of petitioner's motion for a new trial and motion for a directed verdict of acquittal, was erroneous, in view of the insufficiency of evidence adduced in support of his convictions on the substantive and conspiracy racketeering enterprise charges under the Racketeer Influenced and Corrupt Organizations Act, as set forth in Counts One and Twc of the indictment.

PARTIES TO PROCEEDING IN LOWER COURT

In addition to petitioner, John M. Groff (78-5437) was also a defendant-appellant in the proceeding before the Sixth Circuit.

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OPINIONS BELOW

The opinion of the court below, the United States Court of Appeals for the Sixth

Circuit, has not yet been reported (Appendix A, infra, pp. A1-A11).

The opinion of the United States Court of Appeals for the Sixth Circuit in the companion case of United States v Ronald Morelli, which was also decided and filed on February 27, 1981, has also not yet been reported (Appendix B, infra, pp. B1-B21).

The opinion of the trial judge, Senior United States District Judge Ralph M. Freeman of the United States District Court for the Eastern District of Michigan, is not reported (Appendix C, infra, pp. C1-C10).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was decided and filed on February 27, 1981. This petition for certiorari was timely filed by depositing it in a United States post office or mail box, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within the sixty days allowed

for filing by Rule 28 of the Supreme Court Rules. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATUTORY PROVISIONS INVOLVED

This case involves in part 18 U.S.C. § 894, which states as follows:

> "(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit, or
>
> (2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection."

Added Pub.L. 90-321, Title II § 202(a), May 29, 1968, 82 Stat. 161.

This case also involves in part 18 U.S.C. § 1343, which states as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined nor more than $1,000 or imprisoned not more than five years, or both."

Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523.

This case also involves in part 18 U.S.C. § 1952, which states as follows:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Sub-Stances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury."

As amended Pub.L. 91-513, Title II, 701(1)(2), Oct. 27, 1970, 84 Stat. 1282.

This case also involves in part 18 U.S.C. § 1962, which states as follows:

> "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any one person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 942.

STATEMENT OF THE CASE

Petitioner was charged by way of a grand jury indictment on May 4, 1977, which involved nine other defendants and ten counts alleging violations of the federal anti-racketeering statutes. 18 U.S.C. § 894 (1968); 18 U.S.C. § 1343 (1952); 18 U.S.C. § 1952 (1961); and 18 U.S.C. § 1962 (1970). The petitioner was found guilty by a jury on July 21, 1978 of Count One of the indictment, charging a violation of 18 U.S.C. § 1962(c), which states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Petitioner was also found guilty of conspiring to violate 18 U.S.C. § 1962(c).

The proofs offered by the government attempted to demonstrate the existence of a criminal enterprise involving the

defendants, which enterprise was allegedly designed to defraud a number of individuals out of substantial sums of money. The government's theory with respect to petitioner was that he was involved as a participant in a number of card games, which were operated in a manner so as to cheat certain victims. Although the government's proofs showed that petitioner was present during several attempts by other defendants to collect gambling debts, there was no evidence indicating that petitioner made any attempts to instill fear in any alleged victims or that he participated in collection.

Counts Three through Ten of the indictment stated charges relating to various crimes, which the defendants were alleged to have committed, and which allegedly formed the pattern of racketeering activity. Counts Three, Four, and Five alleged various violations of the wire fraud statute, 18 U.S.C. § 1343. Counts Six, Seven, Eight, and Nine alleged the use

of extortionate means to collect an extension of credit in violation of 18 U.S.C. § 894, and Count Ten alleged travel in interstate commerce to promote racketeering activity in violation of 18 U.S.C. § 1952. The petitioner was specifically charged in Counts Three, Four, Seven, and Eight. Count One, however, also charged him with committing the crimes set forth in Counts Six, Nine, and Ten as part of a pattern of racketeering activity. Count One also charged petitioner with participating in the affairs of the enterprise through collection of an unlawful debt.

Counts Three, Four, and Five of the indictment, charging wire fraud, were also realleged in Count One as acts of racketeering, allegedly perpetrated on one James Hutton. On petitioner's Motion for a Verdict of Acquittal, the court dismissed Counts Three and Four against him, and further held that the violations charged in those counts could not be used as predicate

offenses under Count One. Count One also alleged that the collection of an unlawful debt from one Edward Vervane was in violation of 18 U.S.C. § 1962(c). The court held at the close of the government's case that petitioner could not be convicted of the offense charged in Count One on the basis of the collection of an unlawful debt from Vervane or the extortion charged in Count Six. Petitioner's Motion for a Directed Verdict of Acquittal was denied as to Counts One, Two, Seven, and Eight.

Petitioner was charged in Counts Seven and Eight with two instances of collecting unlawful gambling debts by the use of extortionate means from one Charles Wicks. In his instructions to the jury, the trial court stated that a finding by the jury that the petitioner committed the criminal violations in Counts Seven through Nine could constitute evidence for a determination as to whether he was guilty under Counts One or Two. The court further instructed that although petitioner was not named in Counts

Nine and Ten, the jury was to consider whether or not he committed the crimes charged therein, in deciding the question of his guilt or innocence under Counts One and Two. In addition, the court stated that proof of a violation by petitioner of Count Ten, charging the travel in interstate commerce in aid of racketeering in violation of 18 U.S.C. § 1952, would also serve to support a conviction under Counts One and Two.

The court then instructed the jury, as to the various elements requiring proof by the government in order to support a conviction. Initially, the court stated that the government was required to prove three general elements beyond a reasonable doubt: first, that an enterprises engaged in racketeering activity existed; second, that the defendant was employed by or associated with the enterprise; and third, that the enterprise was engaged in or its activities affected interstate commerce.

The jury found petitioner not guilty under Counts Seven and Eight of the indictment, involving the alleged extortion of a Charles L. Wicks.

Count Nine of the indictment alleged that gambling debts were also collected from one Gordon Glaser by the use of extortionate means in violation of 18 U.S.C. § 894. On cross-examination, Gordon Glaser stated that he had never been contacted on the telephone by anyone other than the unindicted conspirators, who were the government's major witnesses at trial. Nor had he received any telegraphic communications. He testified that no one threatened him or tried to get him to pay the check, which was returned due to insufficient funds. Nor was there any proof that petitioner used extortionate means to collect an extension of credit from Kenneth Pichette, in violation of 18 U.S.C. § 894, as alleged in Count Six of the indictment.

The trial judge, in denying petitioner's Motion for a Directed Verdict of Acquittal, held that the case could be submitted to the jury with the racketeering enterprise counts, on the collection of unlawful debt theory. The trial judge also denied petitioner's Motion for a New Trial for similar reason (see Appendix C). The United States Court of Appeals for the Sixth Circuit upheld the trial judge, stating that although petitioner "was not convicted of the predicate crimes with which he was charged, he, like Groff, was unquestionably involved in the collection of unlawful debts." (See Appendix A)

REASONS FOR GRANTING THE WRIT

1. The decision below failed to recognize the insufficiency of evidence adduced in support of petitioner's convictions on the substantive and conspiracy racketeering enterprise charges under the Racketeer Influenced and Corrupt Organizations Act, as set forth in Counts One and

Two of the indictment.

The trial court correctly noted in the instant case that in order to meet its burden in establishing a violation of the first provision of 18 U.S.C. § 1962(c), which prohibits the conduct of an enterprise's affairs through a pattern of racketeering activity, the government had the burden of establishing at least two violations of the statutes set forth in Counts Seven through Ten. The government, in the instant case, did have the burden of presenting evidence to demonstrate that the petitioner was engaged in interstate commerce, in order to prove a violation of 18 U.S.C. § 1952. Mr. Wicks was the only alleged victim to reside outside of the State of Michigan. In light of the jury's acquittal of petitioner under Counts Seven and Eight, charging him with using extor 'onate means in attempting to collect an extension of credit from Charles Wicks in Ohio, the jury could not have found petitioner guilty under Count Ten,

alleging the use of telephonic facilities and traveling in interstate commerce to extortionately collect and attempt to collect an extension of credit from Mr. Wicks in violation of 18 U.S.C. § 1952, even if petitioner had been specifically charged with such a criminal violation in Count Ten. Furthermore, the government clearly did not present any evidence of an activity in interstate commerce, in view of the fact that no alleged victim resided out of state or was defrauded out of state. In the instant case, once the petitioner had been found not guilty in Counts Seven and Eight, no such evidence existed to provide a basis for finding that he had committed the acts alleged in Counts Seven, Eight, or Ten.

The law is well settled that, in the absence of such evidence, a conviction under 18 U.S.C. § 1952 cannot be sustained. In United States v Honeycutt, 311 F. 2d 660 (4th Cir. 1962), the defendant was convicted of violating 18 U.S.C. §§ 1952 and 1953,

involving alleged interstate travel in aid of racketeering, and interstate transportation of wagering paraphernalia. The sole evidence presented by the government was that the defendant was an employee selling wagering paraphernalia and items in the rear of his employer's building, and had merely asked some federal agents whether there was any way to bring the paraphernalia into North Carolina without violating Federal law. Id. at 662. In reversing the defendant's conviction, the court held that the prosecution had failed to show conduct "amounting to counselling or assisting (his employer's) interstate criminal activity." Id. at 662. It must be emphasized that although the evidence in Honeycutt was held insufficient to establish activity in interstate commerce, it was clearly greater than the evidence allegedly demonstrating petitioner's criminal culpability in the instant case.

Similarly, in Grimes v United States, 379 F. 2d 791 (5th Cir. 1967), cert. den. 389 U.S. 846, 88 S.Ct. 104, 19 L.Ed. 2d 113, encompassing a multiple count indictment charging multiple defendants, the court concluded that the defendant was obviously "an integral part of a gambling operation" in violation of Texas law. Id. at 795. However, the court concluded that the government had not shown that the defendant had in any way participated in activities that reached out of state, so that the conviction for substantive offenses under 18 U.S.C. § 1952 could not be sustained. Id. at 795. In the cases of United States v Prince, 515 F. 2d 564 (5th Cir. 1975), and United States v Judkins, 428 F. 2d 333 (6th Cir. 1970), the respective courts reversed convictions under 18 U.S.C. § 1952 which arose from charges of prostitution, on the grounds that the actions of the particular defendants were not proven to be undertaken in interstate commerce, and that

a conviction under 18 U.S.C. § 1952, was, therefore, improper.

The foregoing cases are important to this petition, because they delineate the criteria which the government must satisfy in order to prove the element of interstate commerce under 18 U.S.C. § 1952. Each case discussed shows some governmental demonstrtion of an interstate activity held insufficient to support a conviction under 18 U.S.C. § 1952. In the instant case, once the jury found petitioner not guilty of Counts Seven and Eight, there was no evidence tending to show a violation of 18 U.S.C. § 1952. Accordingly, Count Ten could not have served as a basis for a conviction under Counts One or Two.

The only remaining basis for conviction was Count Nine, alleging a violation of 18 U.S.C. § 894, by attempting to extortionately collect a debt from Gordon Glaser. Under 18 U.S.C. § 1962(c), allegedly violated by petitioner, there must be a proof of a "pattern of racketeering activity",

which is defined to be at least two acts of racketeering activity; see United States v Frumento, 409 F. Supp. 136, aff'd 563 F. 2d 1083 (3rd Cir. 1977), cert. den., Millhouse v United States, 434 U.S. 1072, 98 S.Ct. 1256, 55 L.Ed. 2d 775 and Sills v United States, 434 U.S. 1072, 98 S.Ct. 1258, 55 L.Ed. 2d 776, or proof of the collection of an unlawful debt in the conduct of an enterprise's affairs. 18 U.S.C. § 1962. With respect to the first provision of 18 U.S.C. § 1962 regarding a pattern of racketeering activity, the single transaction alleged in Count Nine, even if proven, which it was not in the instant case, would fail to satisfy the two acts requirement of 18 U.S.C. § 1962(c). As previously stated, the government had to establish at least two violations of the statutes set forth in Counts Seven through Ten, in order to meet its burden in establishing a violation of the first provision of 18 U.S.C. § 1962(c).

Count Nine of the indictment alleged that gambling debts were also collected from one Gordon Glaser by the use of extortionate means in violation of 18 U.S.C. § 894. Petitioner submits that it is clear that the government failed to adduce sufficient evidence to support the conclusion that petitioner violated 18 U.S.C. § 894 as alleged in Count Nine by attempting to extortionately collect an extension of credit from Gordon Glaser. In United States v Gambino, 566 F. 2d 414 (2nd Cir. 1977), cert. den. 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed. 2d 802, the court held that "to prove attempted extortion, it is necessary to prove only an attempt to instill fear." See also Carbo v United States, 314 F. 2d 718, 740-741 (2nd Cir. 1977), 377 U.S. 953, 84 S.Ct. 1626, 12 L.Ed. 2d 498 (1963). No proof of such an attempt by petitioner was adduced in the case at bar. Nor was there any proof that petitioner used extortionate means in attempting to collect an extension of credit from Kenneth Pichette in violation

of 18 U.S.C. § 894, as alleged in Count Six of the indictment.

Thus, the evidence presented by the government could not have supported a conviction of petitioner under Counts Six or Nine of the indictment. The jury found petitioner not guilty of Counts Seven and Eight. In the absence of any proof of guilt under Counts Seven and Eight, there is no evidence that petitioner commmited the acts set forth in Count Ten. In the absence of any proof that petitioner committed the violations alleged in Counts Seven through Ten, the evidence adduced by the government did not demonstrate a pattern of racketeering activity, since there was no proof of two acts of racketeering activity. The trial court rejected petitioner's Motion for a New Trial in part because it concluded that there is no requirement under 18 U.S.C. § 1962(c) that the enterprise, as an enterprise, engaged in a pattern of racketeering activity. However, petitioner would submit that both the trial court and court of

appeals failed to adequately recognize the importance of the fact that there was no evidence that petitioner committed two or more predicate crimes by any participation directly or indirectly in the alleged enterprise's affairs.

The Fifth Circuit Court of Appeals, in the context of a criminal indictment based on purported violations of 18 U.S.C. § 1962, discussed in United States v Elliott, 571 F. 2d 880 (5th Cir. 1978), reh. den. 575 F. 2d 300, cert. den., Delph v United States, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed. 2d 344, and Hawkins v United States, 439 U.S. 953, 99 S.Ct. 439, 58 L.Ed. 2d 344, the interrelationship between the two predicate crimes requirement and criminal liability under 18 U.S.C. § 1962. In the context of an alleged enterprise, which purportedly was involved in a wide variety of crimes ranging from arson to the theft of goods, the Court stated:

> . . . (T)hus, the object of a RICO conspiracy is to violate a substantive RICO provision - here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity-and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity. The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics, rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. To find a single conspiracy, we still must look for agreement on an overall objective. What Congress did was to define that objective through the substantive provisions of the Act. Id. at 902-903. (Emphasis added)

Petitioner submits that the absence of proof that he participated in the affairs of the enterprise by committing two or more

predicate crimes demonstrates that he did not conduct or participate in the affairs of an enterprise through a pattern of racketeering activity, as contemplated by Gambino. Thus, petitioner maintains that the jury's verdict was unjustified, under both Counts One and Two, in that there was no evidence that petitioner committed any substantive offense under RICO or that he conspired to commit such an offense.

The trial court further concluded that even if it was true that petitioner did not commit two predicate crimes in connection with a pattern of racketeering activity, the jury could have found that petitioner was criminally liable under 18 U.S.C. § 1962(c) for collection of unlawful debts from Wicks, Glaser, and/or Pichette. The trial court noted that "the collection of an unlawful debt as prohibited by 18 U.S.C. § 1962(c) does not require the use of a threat or extortionate means", as contrasted with 18 U.S.C. § 894.

Petitioner would submit that the evidence with respect to the alleged collection of unlawful debts was totally insufficient to demonstrate his guilt or participation in such an offense. Glaser, Pichette and Wicks did not testify that petitioner engaged in any collection efforts of their debts. Additionally, even the testimony of the unindicted co-conspirator only established, at most, petitioner's mere presence during collection in certain instances, which in the circumstances of the case at bar may have created "suspicion, but it does not establish participation or guilt." United States v McMahon, 562 F. 2d 1192, 1196 (10th Cir. 1977).

With regard to the allegations of Count Two concerning the conspiracy to violate 18 U.S.C. § 1962(c) as provided for in 18 U.S.C. § 1962(d), the trial court charged the same three general elements as were charged in Count One. Because the facts have in no way changed, the analysis of the

conspiracy issue under 18 U.S.C. § 1962(d) is exactly the same as the analysis under Count One, and two essential elements of the government's case remain unproven. The absence of these two elements is just as fatal to the state's case as they were in Count One. The trial court described the law of conspiracy completely, stating that the defendant must have knowingly and willingly participated in the conspiracy and the conspirators' agreement. The foregoing review of the evidence has demonstrated that the requisite intent, causation, and participation have not been shown with regard to either of the alleged violations concerning Wicks, Pichette, or Glaser. As previously noted, petitioner was not found guilty of Counts Seven and Eight, and for that reason could not have been convicted of Count Ten. The Court in United States v Brown, 555 F. 2d 407 (5th Cir. 1977), reh. den. 559 F. 2d 29, cert. den. 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed. 2d 494, indicated

that a finding of a violation of 18 U.S.C. § 1962(d) adds the additional burden of the specific intent required by conspiracy to the other elements required in 18 U.S.C. § 1962. It is clear that the government's evidence did not establish this requisite intent. In summation, the evidence did not support the petitioner's conviction on Count Two for essentially the same reasons it is inadequate to support the charges alleged in Count One.

In United States v Prieur, 429 F. 2d 1237, 1238, the Sixth Circuit set forth the standard governing a motion for judgment for acquittal:

> (2,3) In testing the sufficiency of evidence to resist a motion for direction of acquittal, such evidence and the inferences that may justifiably be drawn therefrom, are to be viewed in the light most favorable to the government. Glasser v United States, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680 (1942), United States v Luxenberg, 374 F. 2d 241, 248 (6th Cir. 1967); United States v Conti, 339 F. 2d 10, 13 (6th Cir. 1964);

United States v Decker, 304 F. 2d 702, 705 (6th Cir. 1962). Where evidence is circumstantial, the same test applies and it is not necessary that such evidence remove every reasonable hypothesis except that of guilt. Holland v United States, 348 U.S. 121, 139-140, 75 S.Ct. 127, 99 L. Ed. 150 (1954); United States v Thomas, 303 F. 2d 561, 562-563 (6th Cir. 1962); United States v Conti, 339 F. 2d 10, 12-13 (6th Cir. 1964).

Measured by this standard, petitioner would submit that the trial court, viewing the evidence and inferences therefrom in the light most favorable to the government, should have granted petitioner's motion for a judgment of acquittal as to Counts One and Two. Failing that, the trial court should have granted petitioner's motion for a new trial.

Moreover, petitioner respectfully submits that the decision of the court of appeals in the instant case conflicted with other federal court of appeals decisions, as previously cited by petitioner. Petitioner further maintains that the court of appeals sanctioned a departure by the lower court

from the usual course of judicial proceedings, so as to call for an exercise of this Court's power of supervision. The case also involves issues regarding important questions of Federal law under the Racketeer Influenced and Corrupt Organizations Act. See Rule 17 of the Rules of the Supreme Court.

The Court of Appeals did agree that an acquittal of a defendant on either of the two predicate offenses would demonstrate that a defendant was not criminally responsible for engaging in a pattern of racketeering activity under 18 U.S.C. § 1962. (See Appendix A; p. 6). However, the court held that "while Turbyfill was not convicted of the predicate crimes with which he was charged, he, like Groff, was unquestionably involved in the collection of unlawful debts." (See Appendix A; p. 7). Petitioner maintains that the Court of Appeals and trial court both erred for the reason that he could have only been convicted for the offenses charged in Counts One and Two on the basis of his mere presence, during the course of debt

collections initiated and conducted by other defendants or participants.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDICES A, B, AND C

Hereafter are set forth, respectively, the opinions rendered by the Sixth Circuit Court of Appeals in this Case (Appendix A) and the companion decision of United States v Morelli (Appendix B). The opinion of the trial court, denying petitioner's motion for a new trial, is also set forth (Appendix C).

Nos. 78-5437 and 78-5480

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN M. GROFF (78-5437) and CURTIS TURBYFILL (78-5480),
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed February 27, 1981.

Before: WEICK, LIVELY and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. Appellants John M. Groff and Curtis Turbyfill, with seven others, were named as defendants in a ten-count indictment charging substantive and conspiracy violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) and (d) (1976) (counts 1 and 2); three wire fraud offenses, 18 U.S.C. § 1343 (1976) (counts 3, 4 and 5); four extortionate credit collection offenses, 18 U.S.C. § 894 (1976) (counts 6 through 9); and one count of travel in interstate commerce to collect a debt by extortionate means, 18 U.S.C. § 1952 (1976) (count 10).

Turbyfill was charged in counts 1, 2, 3, 4, 7 and 8. Groff was charged in counts 1 and 2. The trial court dismissed the wire fraud charges (counts 3 and 4) against Turbyfill and the jury acquitted him of the extortionate credit collection charges (counts 7 and 8). He was convicted, however, on the substantive and conspiracy racketeering enterprise charges

(counts 1 and 2). Groff was convicted of the substantive racketeering enterprise offense (count 1), but was acquitted of conspiracy (count 2).

Both appeals challenge the sufficiency of the evidence to sustain appellants' conviction and Groff further alleges that the indictment was insufficient to inform him of the charges against him. We disagree and affirm.

I.

Turbyfill was involved in the "scams" run on Charles Wicks, Kenneth Pichette and Gordon Glaser, while Groff was involved only with the scam on Wicks. These scams took place in the context of a much larger enterprise which is detailed in the opinion filed in the companion case, *United States* v. *Morelli*, No. 79-5031 (6th Cir.), also decided today. The evidence produced at trial depicted Turbyfill's and Groff's involvement with the enterprise's scams as follows.

Luca and LaPuma met with Groff at a bar on a visit to Warren, Ohio. While at the bar, Groff introduced them to Charles Wicks, whom Groff had known for some time. After Wicks left, Groff suggested to Luca and LaPuma that they could cheat Wicks at cards. On a later visit to Warren, Ohio, during which Turbyfill accompanied Luca, a card game with Wicks was arranged. Both Groff and Turbyfill acted as players. Wicks lost more than $10,000 in this game. Since Wicks was able to pay only $200 to $300 at the time, Groff assured the others that he would call or see Wicks about picking up the balance.

Later, Turbyfill again accompanied Luca to Warren, Ohio, this time to pick up a $3,000 to $4,000 payment on the debt. Luca then informed Wicks that the Groff brothers would pick up the rest. Luca engaged in numerous interstate telephone conversations with the Groffs concerning collection of Wicks' debt. Some time later, Wicks gave Groff a deed to

some property. Groff and his brother sold the property and gave the proceeds to LaPuma, for which they received $1,000. The proceeds from the sale of this property were insufficient to satisfy Wicks' debt. Luca, Turbyfill and Vito Cappozoli then went to Warren, Ohio to intimidate Wicks into paying the debt. Cappozoli was dressed as, and apparently looked like, a mob hit man. They received a check from Wicks that later bounced. Eventually, the full debt was collected. Turbyfill also accompanied Luca and others to a racetrack in West Virginia to see Wicks. Another card game was played at the Waterford Inn. Wicks lost an additional $1,200 during this game and extortionate means were used to collect this debt.

Turbyfill played in other rigged card games in which the victims were bilked of substantial sums of money. He also participated in the collection of the resulting debts. In late 1971 or early 1972, Turbyfill played in a game at Luca's apartment in Warren, Michigan, during which Kenneth Pichette lost $3,000. Turbyfill later accompanied Luca on a few visits to collect Pichette's debt. Turbyfill also played in the second game that Luca and LaPuma set up with Gordon Glaser. During this game, Glaser lost between $2,000 and $3,000. The next day, Turbyfill participated in a discussion with Luca and LaPuma concerning the best method for collecting Glaser's gambling debt. They decided that Luca should collect this debt. Extortionate efforts were eventually used to do so.

At the close of the government's case, all defendants moved for a directed verdict of acquittal. In an extensive opinion delivered from the bench, Senior United States District Judge Ralph M. Freeman considered the motions of each defendant with respect to each count. Initially, he noted that both defendants agreed that the first two requirements of a RICO enterprise violation had been proven: the enterprise existed and it was engaged in and its activities affected interstate commerce.

Judge Freeman then thoroughly analyzed the evidence against each defendant.

John Groff could not be convicted of the substantive RICO violation on the pattern of racketeering theory, Judge Freeman held. There was no evidence of Groff's involvement in the enterprise other than his participation in the extortionate credit collection alleged in count 7. Since this could establish only a single predicate crime, no pattern was shown on Groff's part. Groff could not be chargeable with the other predicate crimes committed by the conspirators because those crimes were not, in Judge Freeman's words, "in any way related to or a foreseeable result of the immediate purposes for which Groff joined the conspiracy, that being to win money from Wicks in a card game in Warren, Ohio." The jury could decide Groff's guilt on the substantive RICO charge under the collection of an unlawful debt theory, however, since there was evidence presented that Groff participated in the card game that led to Wicks' debt and since Groff received and sold certain property of Wicks to satisfy this debt.

The jury, Judge Freeman ruled, could find Curtis Turbyfill guilty of engaging in a pattern of racketeering activity, but only the conduct alleged in counts 7, 8, 9 and 10 could be used as the basis for such finding. Regarding count 7, sufficient evidence was presented that Turbyfill participated in the card game in Warren, Ohio which resulted in Wicks' debt, that he participated in conversations which dealt with ways to instill fear in Wicks to collect the debt, and that he accompanied Luca and Cappozoli on a trip to Warren, Ohio in an attempt to intimidate Wicks into paying the debt. Although Turbyfill did not directly participate in the extortionate debt collection alleged in count 8, the jury could reasonably infer from his involvement in the first Wicks scheme that he participated in the West Virginia card game knowing that any debt unpaid by Wicks would be the subject of a later extortion.

Turbyfill did not participate in the first card game with Glaser which gave rise to the extortionate credit collection alleged in count 9. Judge Freeman ruled, however, that the conduct alleged in count 9 could be used as a basis for establishing a pattern of racketeering activity on Turbyfill's part. Since Turbyfill participated in the second card game with Glaser, and since the jury could reasonably infer that extortion was a foreseeable result of attempts to obtain money from Glaser, it was a substantial crime committed in furtherance of the immediate objectives for which Turbyfill joined the conspiracy. Although Turbyfill did not directly participate in the interstate telephone calls from Luca to Wicks and the Groff brothers that led to the charges in count 10, there was substantial evidence from which the jury could conclude that Turbyfill traveled from Michigan to Ohio for the purpose of facilitating the extortion of Charles Wicks.

Judge Freeman also ruled, however, that the activities alleged in counts 3, 4 and 6 could not be used to establish a pattern of racketeering activity on Turbyfill's part. There was not enough evidence, in Judge Freeman's view, to connect Turbyfill with the two acts of wire fraud alleged in counts 3 and 4. Since the Pichette debt collection occurred prior to the Wicks and Glaser scams, Turbyfill could not have known at the time of LaPuma's extortionate debt collection techniques. He could not, therefore, be held criminally liable for the extortionate acts in collecting the debt alleged in count 6.

Finally, Judge Freeman held that the government could go to the jury with the RICO count against Turbyfill under the collection of an unlawful debt theory. There was evidence presented that Turbyfill accompanied Luca and Cappozoli to Warren, Ohio to collect the Wicks debt and that he accompanied Luca to Pichette's home to collect that debt. He also participated in the card game with Wicks in West Virginia and in the second game with Glaser. The collection of these unlawful debts was foreseeable.

Our view of the record convinces us that in considering

and ruling upon the various motions for directed verdict, Judge Freeman used an abundance of caution and was always mindful of the dangers which attend prosecution under so broad an Act as RICO.

II.

The defendants principally complain that since they were not convicted of any of the predicate crimes alleged, it necessarily followed that they could not have been guilty of the RICO counts. The statute clearly does not support this position. As Judge Freeman recognized, RICO imposes criminal liability under either of two theories.

First, RICO imposes liability upon any person who conducts or participates in the conduct of an enterprise's affairs through a "pattern of racketeering activity." 18 U.S.C. § 1962 (c) (1976). A "pattern of racketeering activity" is defined as the commission of two acts specified in 18 U.S.C. § 1961 (1) (1976) within the statutory time period. 18 U.S.C. § 1961(5) (1976). An acquittal on either of these two predicate offenses, then, would absolve the defendant of criminal responsibility for engaging in a pattern of racketeering activity.

Second, RICO imposes liability upon any person who conducts or participates in the conduct of an enterprise's affairs through the "collection of an unlawful debt." 18 U.S.C. § 1962 (c) (1976). Since this is an independent basis for RICO liability, an acquittal on any charges predicate to liability on the "pattern of racketeering activity" theory does not affect the validity of a conviction under RICO for engaging in the collection of unlawful debts.

Both Groff and Turbyfill were shown to have been fully aware of the existence and nature of the enterprise and to have participated in it. Both had a stake in the outcome and reaped the benefits from their activity. While Turbyfill

was not convicted of the predicate crimes with which he was charged, he, like Groff, was unquestionably involved in the collection of unlawful debts.

Groff further contends that the government failed to establish the interstate nature of his individual debt collection activities. He claims that only "1 event at 1 time in 1 situation for 1 victim in 1 State for 1 purpose and maybe 1 violation . . ." was shown by the government. Notwithstanding the fact that no serious claim with respect to this issue was raised at the time of the motion for directed verdict, we find no merit in it. While we believe that Groff has substantially understated his own role in the activities, we agree with Judge Freeman that this argument "completely misses the thrust of the interstate element of section 1962." It is the enterprise, not the individual defendant, which must engage in or affect interstate commerce.

III.

Finally, Groff complains that the indictment failed to sufficiently inform him of the charges against him. Specifically, Groff states that the indictment was pleaded in a conclusory fashion, in general statutory language, rather than in plain, concise and definite language, as required by Rule 7, Federal Rules of Criminal Procedure; that certain subsections of RICO were miscited; and that the indictment alleged violations of certain Michigan statutes whereas the government attempted to prove violations of similar Ohio and West Virginia statutes.

Since the substantive and conspiracy RICO charges against Groff went to the jury only on the collection of an unlawful debt theory, we may safely ignore those parts of the indictment alleging a pattern of racketeering activity on his part. Since Groff was found not guilty of the conspiracy count, we need look only at the substantive RICO charge contained in count one of the indictment. The operative parts of the indictment then become:

COUNT ONE

18 U.S.C. § 1962(c) – CONDUCTING AN ENTERPRISE . . . THROUGH COLLECTION OF UNLAWFUL DEBTS.

1. That from on or about December 1, 1970 through January 3, 1975, inclusive, in the Eastern District of Michigan and elsewhere, defendants, RONALD MORELLI aka "Ron", "Ronnie"; ROBERT LA PUMA aka "Bob", "Big Bob"; THOMAS MISKO aka "Tom", "Tommie"; AUGUSTINO GIORDANO aka "Augie"; CURTIS TURBYFILL; JOE MELFI; JOHN GROFF and MIKE GROFF, being associated in fact with each other and Peter Luca, thereby being persons associated with an enterprise as defined in Title 18, United States Code, Section 1964(4), which enterprise was engaged in and the activities of which affected interstate commerce, did conduct and participate directly and indirectly in the conduct of their affairs . . . through collection of unlawful debts;

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3. The defendants, RONALD MORELLI, ROBERT LA PUMA, THOMAS MISKO, JOE MELFI, CURTIS TURBYFILL, JOHN GROFF and MIKE GROFF, did at various times herein participate and attempt to participate in the collection of unlawful debts, as defined by Title 18, United States Code, Section 1961(c), namely, the collection of debts and claims of money incurred or contracted in gambling and wagering activities and in connection with the business of gambling as described in paragraph 2(A) above,[1] in violation of the laws of the State of Michigan; namely, Michigan Compiled Laws, Sections 750.157(a)(b), 750.301 and 750.314, as follows:

[1] Paragraph 2(A) of count one of the indictment, describing the alleged pattern of racketeering activity, states in pertinent part:

A. RONALD MORELLI, ROBERT LA PUMA, THOMAS MISKO, CURTIS TURBYFILL and JOE MELFI did finance and en-

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> 3) From on or about February 1, 1972 to on or about September 30, 1972, said defendants obtained monies and participated in the collection of divers sums from Charles Wicks in the Eastern District of Michigan and elsewhere.

A review of the operative parts of the indictment convinces us that it was not so conclusory, ambiguous, or indefinite that Groff was unable adequately to prepare his defense. That the indictment tracked the statutory language in pleading the offense in no way prejudiced the defendant. As the Supreme Court reaffirmed in *Hamling* v. *United States*, 418 U.S. 87, 117 (1973) (quoting *United States* v. *Carll*, 105 U.S. 611, 612 (1882)): "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" Here, the indictment clearly alleges that Groff, among others, participated in a card game with Charles Wicks, and that he participated in the collection of the resulting debt. The indictment also specifies the time period during which these activities occurred.

These activities, however, were alleged to have occurred in the Eastern District of Michigan and elsewhere. While the majority of the debt collection activities occurred outside

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gage in unlawful gambling and games of chance including card games, dice games and liars poker with divers persons, including Charles Wicks, Ed Vervane, Jr., Kenneth Pichette and Gordon Glaser; in violation of Michigan Compiled Laws, Sections 750.157(a)(b), 750.304 and 750.314:

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> 3) From on or about February 1, 1972 to on or about September 30, 1972, said defendants engaged Charles Wicks in illegal gambling and wagering activities and did obtain monies therefrom in the Eastern District of Michigan, in violation of Michigan Compiled Laws, Sections 750.157 (a)(b), 750.301 and 750.314.

Michigan, some acts such as Luca's telephone calls to the Groffs concerning Wicks' debt did originate in the Eastern District of Michigan. Groff, therefore, could not have been misled by this allegation.

The most disturbing error in the indictment, however, is the allegation that certain Michigan statutes were violated whereas the government's proof at trial showed violations of Ohio law. Rule 7(c)(3), Federal Rules of Criminal Procedure, states:

> Error in the citation [of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated] or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

The citation of an erroneous statutory provision is not fatal to the conviction, then, if the defendant knew the nature of the charges against him. *United States* v. *West*, 562 F.2d 375 (6th Cir. 1977), *cert. denied*, 435 U.S. 922 (1978); *Steinert* v. *United States District Court for the District of Nevada*, 543 F.2d 69 (9th Cir. 1976); *United States* v. *Chestnut*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976). *See also Williams* v. *United States*, 168 U.S. 382, 389 (1897). The court must look at the facts alleged in the indictment to determine whether an offense has been properly charged. *United States* v. *West*, *supra*, at 378-79.

The factual statements in the indictment alleged the collection of an unlawful debt incurred in gambling activities. Since gambling is a clear violation of Ohio law, the indictment sufficiently apprised Groff of the charges against him. Nor does it appear that Groff would have altered his defense in any way had the Ohio statutes been cited. The incorrect citation of Michigan law, therefore, constitutes harmless error.

Under a similar rationale, the miscitation of certain subsections of RICO in the indictment also constitutes harmless error. The citation of RICO provisions were many times technically erroneous, but they were not so misleading as to impair Groff's defense.

Affirmed.

No. 79-5031

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RONALD MORELLI, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed February 27, 1981.

Before: WEICK, LIVELY and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. Ronald Morelli was found guilty by a jury in the United States District Court for the Eastern District of Michigan of conducting the affairs of an enterprise through a pattern of racketeering activities and through the collection of unlawful debts, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1976); of conspiring to violate the Act, 18 U.S.C. § 1962(d) (1976); and of two counts of wire fraud, 18 U.S.C. § 1343 (1976), the conviction of which was a predicate to his conviction under RICO, 18 U.S.C. § 1961(1) and (5) (1976).

Before the case was submitted to the jury, the trial court granted a judgment of acquittal of six other counts of the indictment charging Morelli with wire fraud (count 4), extortion (counts 6 through 9), and the use of wire facilities to facilitate extortion (count 10).

In acquitting Morelli on counts 4, 6, 7, 8 and 9, Senior United States District Judge Ralph M. Freeman held that while there was "substantial evidence that an enterprise existed, that its affairs affected interstate commerce and that the defendant Ronald Morelli was associated with the enterprise," the evidence connecting Morelli with the particular conduct dismissed was insubstantial. This conduct, Judge Freeman found, was not a sufficiently foreseeable result of Morelli's participation in the conspiracy to justify its use as the basis for his conviction on that count. With respect to count 10, charging wire fraud in the extortion of Charles Wicks, Judge Freeman found that there was absolutely no evidence to connect the defendant with the extortion. Judge Freeman further held that even if the language of the indictment was read to include an attempt to collect an unlawful debt, without reference to extortion, it was "clear that the attempt to collect an extention of credit is not a violation of section 1962."[1]

I.

Before addressing the specific alleged bases for reversal, it is necessary to describe in some detail the nature of the enterprise in which Morelli and his associates were involved.[2] The general purpose of the enterprise was the development

[1] Judge Freeman's ruling on the defendant's motion to dismiss, which addresses each count of the indictment, reflects the great care with which he considered and disposed of each claim. *See* Appendix, vol. 5, at 1021-41.

[2] Named as co-defendants with Morelli in the RICO and conspiracy counts of the indictment were Robert LaPuma, also known as "Bob" and "Big Bob," Thomas Misko, "Tom" or "Tommy," Augustino Giordano, or "Augie," Curtis Turbyfill, Joe Melfi, John Groff, and Mike Groff. Also named in the conspiracy count was Ronald Jones. Morelli originally went to trial on May 1, 1978, with the other defendants. However, Judge Freeman declared a mistrial as to the case against him when his defense counsel had to undergo emergency surgery. He was therafter tried alone by another jury empanelled August 24, 1978. On conviction, he was sentenced to 15 years imprisonment each on the RICO and conspiracy counts and to five years on each of the two predicate crimes, the terms of the sentences of each count to run concurrently. He was also fined $10,000.

of continuing schemes (or "scams") to obtain money from unwitting but vulnerable victims.[3] A careful examination of the trial record generally confirms defense counsels' claim that Morelli's contact with the individual victims of individual scams was limited. This factor, clearly, persuaded the district judge to acquit Morelli on five of the counts charging predicate crimes. Nonetheless, as the trial judge observed, there was ample evidence of Morelli's full involvement in the enterprise and in the conspiracy itself. Morelli acted as business manager of the enterprise, dealing purposely through other members of the enterprise. As will be described later, Morelli surfaced most visibly in the Hutton scam, which formed the basis for his conviction on the two wire fraud counts.

In operating the enterprise, each scheme or "scam" was carefully crafted by the enterprisers to appeal to the victim's particular weakness, whether for gambling, sex, or dishonest profit. It was the government's theory that Morelli was the *de facto* head of the enterprise, coordinating its activities, passing judgment upon various schemes proposed by the other members, and acting as a reliable treasurer. The principal front man, and prime witness for the government, was Peter Luca.

Luca had an extensive criminal record, including possession of counterfeit notes, illegal gambling, extortion, check fraud, and procuring for gross indecency. For over twenty years he had derived his income from running gambling games and providing women for prostitution. Luca's specialty was gambling. He acted often as dealer or banker in card games involving marked cards, loaded dice, hand signals and other

[3] While the term "scam" finds no dictionary definition, counsel for the parties have throughout the appeal employed the term either as a noun or a verb, to describe a specific unlawful scheme. Apparently the term is enjoying some current popularity in use, *e.g.*, "Abscam," meaning, I suppose, an Arab scam. To devotees of Robert Redford movies, the term is probably synonymous in meaning with "sting."

devices to insure that the elements of chance did not interfere unduly with the profitability of the business. Luca's decision to cooperate as a government witness came not so much from any resolution to reform his life as from distaste for a ten-year prison term earlier imposed upon him for extortion. Counsel for the defendant persuasively argue that Luca's credibility was substantially affected by his past unsavory record and by his present desire to escape prison life by testifying to anything which he might think would advance the day of his freedom. As counsel point out, he was successful. He did, indeed, obtain a release after serving only one and one-half years of his ten-year sentence. All the same, the jury rather clearly believed most of his testimony, no doubt because it was largely corroborated by other witnesses. We are, therefore, bound to view the evidence, including Luca's testimony, in the light most favorable to the government.

The proof at trial related to five scams, the victims of which were Ed Vervane, Jr., Charles Wicks, Kenneth Pichette, Gordon Glaser, and finally, James Hutton. A summary of the testimony concerning each scam is necessary to understand the pattern of the overall operation.

Ed Vervane, Jr. had a wealthy, indulgent father. Young Vervane had long been a friend of Luca. Through Luca, Vervane became acquainted with co-defendant Robert LaPuma. It was LaPuma who thereafter devised a scheme to involve Vervane in a rigged game of "liars poker." Accordingly LaPuma, Luca and Morelli devised a plan. Luca was to bring Vervane to meet Morelli and LaPuma at a restaurant on the pretext that they would all go to a party where they could meet some girls. Once there, Vervane was to be enticed into a game of "liars poker" with Morelli, Luca and LaPuma. The game, rigged by signals, was to be for a "dollar a hand." Only when Vervane had lost "$16" was he informed by Morelli that a dollar, in the terminology of the

players in this exclusive group, meant $100 and that he was therefore in their debt to the tune of $1600. Proceeding with the scheme, Luca and LaPuma then talked the gullible Vervane into trying to recoup his losses. Predictably the debt grew to $3,000. The enterprisers, already familiar with Vervane's father, also knew that the father would instinctively protect the son, especially if the money was owed to members of the mob or the Mafia. Relying upon this, they proceeded to have Vervane roughed up by LaPuma and to threaten Vervane's father, resulting in the ultimate collection of the debt. Morelli gave Luca $600 as his share.

Gambling formed the basis for the scam which involved Charles Wicks in 1972. A real estate broker in Warren, Ohio, Wicks was lured into a card game called "stacks," operated by Luca with the aid of co-defendants LaPuma, Curtis Turbyfill, John Groff and Mike Groff.[4]

The Wicks scam was a refinement of the Vervane scam. LaPuma, who apparently was seen by his cohorts to possess the proper physical appearance and reputation to qualify him as a member of the "Mafia," was chosen to win the game while Wicks and the other conspirators were to be the losers. The game was rigged by the use of marked cards and hand signals. Wicks lost $10,000. No collection, of course, was made from the other apparent losers. Wicks only had $500 on him at the time. It took six to eight months for him to pay off the remainder of the debt, accomplished in part by a deed to certain property, by cash, and by check. Still gullible, Wicks was enticed into another game at a race track in West Virginia. He lost $1,200. Morelli became concerned when LaPuma was only able to collect $4,000 or $5,000 of the debt and Wicks appeared to be stalling on the

[4] The appeals of John M. Groff and Curtis Turbyfill from their conviction in the earlier trial are the subject of a separate appeal in this court and an opinion affirming their individual convictions has been entered concurrently with this decision.

payment of the rest of it. He thereafter pressed Luca and LaPuma to pursue collection, and suggested that they persuade Wicks to accompany them to Las Vegas, where they could at least get $5,000 through the use of his casino credit card. Luca or LaPuma transmitted the payments they received from Wicks, and Morelli who thereafter divided the money gave them their share. As noted earlier, Judge Freeman dismissed the count of extortion against Morelli because the government was unable to sufficiently connect Morelli with the extortionate efforts which it claimed had been made to obtain payment of this gambling debt.

In late 1971 or early 1972, Morelli came up with a scheme to involve Kenneth Pichette, a jockey, in a rigged card game with the expectation that when he was unable to make good on his anticipated losses, Pichette could be persuaded to fix a horse race. Pichette predictably lost $3,000, but Morelli concluded that the loss was not sufficiently large to persuade Pichette to fix a race. He therefore told Luca and LaPuma to collect the money instead. Pichette finally managed to pay off between $1,500 and $1,800 of the debt. Luca collected it and passed it on to LaPuma or Morelli, who thereafter divided the profits.

Gordon Glaser, a young man from Shaker Heights, Ohio, was lured into a scam by the wiles of Luca's girlfriend, one Lynn Offerdahl, whom he met, with Luca, at a race track at Windsor, Ontario. Though Lynn was Luca's girlfriend, Luca was not averse to sharing Lynn's favors with Glaser for a fee. Thereafter Luca, LaPuma and Morelli discussed the possibility of introducing the gullible Glaser to their customary rigged games. After four games, which took place over a one-year period at Luca's residence, Glaser lost between $10,000 and $14,000. In each case, Glaser could only pay a small part of the loss at the time incurred, and his credit was accepted. His later payments, when collected, were given to Morelli who therafter divided the profits with the other

participants. Typically, Morelli does not appear to have actually participated in the games at Luca's residence, although his role as control man and banker was clearly established.

The crowning achievement of the enterprise was the scam involving James Hutton, a wealthy building contractor and insurance man from Detroit. Luca had known Hutton since 1969 and had sold him pornographic films and provided women for Hutton's insurance business. Early in 1970, Luca, Morelli and LaPuma discussed trying to get Hutton involved in the traditional "game of chance." In two efforts, Luca failed. If Hutton remained uninterested in gambling, he was not, however, immune from the suggestion that he might reap huge profits from various schemes which Luca, LaPuma and Morelli concocted as part of their program to part Hutton from his wealth.

At Morelli's suggestion, Luca persuaded Hutton that he and LaPuma had an opportunity to obtain a trailer laden with stolen J & B Scotch whiskey which could be resold to the Mafia for between $100,000 and $200,000 and that $20,000 was needed to finance the operation. Hutton, interested, asked Luca to introduce him to Thomas Misko, who was purported to be an expert in the field of stolen merchandise and who supposedly was running the operation. As a result of that meeting, Hutton put up between $8,000 and $9,000 with the belief that the rest of the $20,000 was being invested by Misko, LaPuma and Luca. Once more the money was turned over to Morelli who in turn divided it among the participants in the scheme. Needless to say, Hutton never saw any part of his investment again.

Thereafter between 1972 and 1974, Hutton, ever gullible and ever anxious to recoup his growing losses by involvement in further, non-existent illegal schemes, was bilked of approximately $200,000. Those schemes included the selling of stolen grain to a race horse owner in Florida, dealing in

stolen snowmobiles, cigarettes and television sets, stolen women's apparel, appliances, and in narcotic pills. Each time when the particular scheme failed to produce any return, Hutton was put off by the explanation that the police had intervened to defeat the project. The enterprising conspirators even went so far as to stage a fake arrest of LaPuma for Hutton's benefit, at Morelli's direction.

While it appears incredible by hindsight, the conspirators even took advantage of the supposed failure of the concocted schemes to obtain further money from Hutton. Thus, he yielded up an additional $5,000 to pay bail money for LaPuma as a result of his fake arrest, and another $6,000 to pay what was represented as a mob contact in Cleveland to expedite the sale of the narcotic pills. He also was induced to part with $5,000 or $6,000 to pay co-defendant Turbyfill to leave town, upon the representation that the latter was an informer. Another $500 was extracted on the pretext that it was needed to bail out a driver who was arrested while driving one of the trucks containing stolen merchandise. Another $1,500 was paid on the representation that it was required to hire a bulldozer to free a truck which had been bogged down in soft dirt. In each case, the money obtained from Hutton was given to Morelli for division among the various participants in the scam.

All of this time, Morelli himself remained in the background. Late in 1972, however, Hutton asked to see Morelli to find out why all of his investments had gone bad and to obtain some sort of a guarantee that eventualy he would recover his investment. As Luca put it:

> A Well, after all the screaming and the yelling, and the scamming on him and scheming, he [Hutton] was frustrated. He said he wanted to meet the main man, he was tired of being screwed around, that why was the Mafia letting all these things get away and go down and how are we allowed to let

him get away with it if we were connected with the mob, and he wanted to meet personally with Mr. Morelli, and he was tired of being screwed around and he wanted a guarantee now that his money was going to come back. In other words, he finally wanted to complain to the main people.

Q What had you told Mr. Hutton about Mr. Morelli?

A We told him he was our main man in front of the Giacalones and that he represented the outfit and that he was our boss.

When Morelli was told that Hutton was becoming a problem, that he might go to the law or quit giving money, he decided to meet with him. According to Luca, Morelli said: "O.k., it's time to sit him down. Bring him to me. Try to hit him for one big cash load, one big total amount, and if we get it, we'll just end it and wipe him out and we don't want to see him no more." At this meeting, Morelli discussed a new venture with Hutton wherein Morelli proposed to send Luca and LaPuma to Mexico to bring back some narcotics. The proceeds from the sale of these narcotics, Hutton was told, would be more than sufficient to recoup all of his losses and generate a profit for him of $100,000. Hutton, however, would have to put up $35,000 to $50,000 to finance the operation, with Morelli supposedly putting up a like amount. By this time Hutton was beginning to shed his naiveté; this time he decided to think about it and let the conspirators know his decision later.

About the same time, Morelli and his entourage were planning a vacation in Florida, a trip which Luca told Hutton was necessary to transact the narcotics deal. Hoping to wrap up this deal before they left, Morelli ordered another meeting with Hutton to again try to convince him to invest in this venture. Luca recalled the conversation at this second meeting as follows:

> Well, Mr. Hutton came in and Mr. Morelli said, "Sit down" and "What is your decision? What are you going to do? We're getting ready to go. Everything is all set." Mr. Hutton said, "I'm having problems and I don't know if I can get that much cash up right now. I'm not sure yet." Mr. Morelli said, "Well, if you want to get your hundred thousand dollars back, here's your chance at one time, so give Pete a decision right away or it's going to be too late. You've only got another week or two to make your decision." Mr. Hutton said he might need a little more time and he didn't know if he can go for it or if he can get that kind of cash at this time. That was the end of the conversation.

The testimony of the victim, Hutton, generaly corroborates that of Luca. He quite freely acknowledged his own culpability. Cross-examined by counsel for Morelli, Hutton explained the technique which ever more deeply involved him in financial loss:

> A They would always come back with another story that they were going to get my money back, they were going to have something else and they guaranteed me I would have my money back and they would get me involved in another one.
> Q In other words, the next story was better than the last?
> A Yes.
> Q Weren't you bothered by the fact that this was stolen stuff you were buying?
> A Yes, I was.
> Q But you didn't stop?
> A I was just trying to get my money back.

Hutton, in a minor divergence from Luca's testimony, remembered meeting with Morelli on a total of four occasions to discuss his losses. Three of these meetings, according to Hutton, were rather brief. The narcotics deal was suggested during the fourth meeting. Hutton testified:

Q Did you speak with Mr. Morelli at this meeting?
A Yes.
Q Can you indicate, please, what you said to Mr. Morelli and what his responses were?
A He said they had another package put together and that I would have to come up with $30,000 and that they would – they were going to have Bob LaPuma and Pete Luca go down to the islands and get a load.
Q Did he indicate what "get a load" was?
A It was referred to as dope. They didn't say dope but that was the impression that they gave me.
Q What was your response?
A I told him I was broke and couldn't come up with $30,000.
Q Did Mr. Luca or Mr. Misko or Mr. LaPuma say anything about that at that third meeting?
A Well, they kept pushing me to try to see if I would come up with this money.

• • •

Q (By Ms. Simms, continuing): When you indicated to Mr. Morelli that you were broke and didn't have the money, what was his response, if any, to that?
A He got very irritable with Bob LaPuma and Pete Luca and said they had no business arranging that meeting, knowing that I didn't have the money. And the conversation did come up at that time that the only way I could get the money was to put a mortgage on my home, and right away Morelli wanted to know how long that would take, and I said probably a month. And this is where he was very upset and he went stomping out.

What happened thereafter in the development of this narcotics scam forms the background for the four counts of which Morelli was subsequently convicted: counts three and five, the wire fraud charges, count one, the RICO violation, and count two, the conspiracy to commit a RICO

violation. Since Hutton still had not agreed to put up the money to finance the narcotics deal by the time Morelli left for his vacation in Florida, he decided to have Hutton invited to join him there. Luca testified:

> I discussed with Mr. Morelli, they told me where they were going to be, said they would be at the Newport, come on down there, that we would vacation, and while we were vacationing we would call Mr. Hutton. And I was told that I should call him and try to get him to come down there to show him I was down there and try to have him and his wife come down there and we would take him out on maybe a Teamsters yacht and party him and his wife, and influence him down there to maybe still get this $35,000 to put up for the drugs.

Thereafter Luca testified to the telephone call which formed the basis for count 5:

> Q What did you say to him [Hutton]?
>
> A Told him I was at the Newport, I was standing there with Mr. Morelli, that he had made a decision or would him and his wife want to come down, that there was a lot of influential people around there and that it looks pretty good on that drug scene to come down, and did he want to come down, him and his wife, right now. He said no, he didn't know if he could make it. I said, "Well, you want to talk to Mr. Morelli?" He said, "Yes," and I handed the phone to Mr. Morelli.
>
> • • •
>
> Q (By Ms. Simms): What did you hear on your end of the phone that Mr. Morelli said?
>
> A "Jim, have you made a decision? Come on down. . . . We're partying, and also get down or your're going to miss the boat on getting your money back in a hurry. So are you going to come down?" That's what I heard.

Q Was that the end of the conversation with Mr. Hutton and [sic] Mr. Hutton?
A Yes, he hung the phone up.
Q Did you ever receive any money in Miami from Mr. Hutton?
A Yes, I did.
Q Approximately how much money, if you recall?
A I don't know. Couple hundred dollars or so.
Q Do you remember approximately when that was?
A Well, at the same time that I was down there in Miami.
Q Mr. Luca, would you please look at what has been marked as Government's proposed exhibit 26, and without telling the jury what that is . . . does that refresh your recollection at all as to the dates you were actually in Miami?
A Yes.
Q Could you give us what date that refreshes your recollection as to when you were in Miami?
A February of 1973.
Q Was that during the time that you also received some money from Mr. Hutton?
A Yes.
Q Is that also the time during which Mr. Morelli spoke with Mr. Hutton on the phone?
A Yes, it was.

• • •

Q (By Ms. Simms, continuing): What was the couple of hundred for?
A Mr. Morelli, when he hung up the phone on Mr. Hutton and he said he wasn't going to come down or come with the thirty-five thousand, Mr. Morelli suggested I call him back and tell him at least mail some money down for expenses, give him a story and get some money down here for expenses. And I called Mr. Hutton back and laid a story on him.
Q What was the story you laid on him?
A I told him that if I stuck around, something like I was running out of money and I had a chance to

get a little piece of the action but I had no money, or something I laid on him, and I said, "I'm going to need five hundred or a thousand dollars. I says "Why don't you wire it down to me?" He wired me, I think, only a couple of hundred.

Q Is that the only money you received from Mr. Hutton while you were in Miami?

A I don't know. I think I got two wiregrams. I believe there was two. I'm not sure.

Q Do you recall approximately when the second one was?

A They were pretty close to each other. Maybe a week, two weeks apart. I'm not positive.

Q Do you remember what the second one was for?

A No. I know I laid another story on him. I don't know exactly what story I told him but it was a bullshit story.

• • •

Q (By Ms. Simms): How long were you actually in Miami, Mr. Luca?

A Well, around two or three weeks.

• • •

Q (By Ms. Simms): Mr. Luca, you said Mr. Hutton wired you money twice?

A I believe so.

Q Where did you pick the money up from?

A The Western Union wiregram, Western Union telegram.

Q Do you now recall who the actual wire money order was payable to?

A Who it was made out to?

Q Yes.

A To me.

Q What did you do with the money once you got it?

A Picked it up and went back to the Newport motel and told Ronnie and the guys that were sitting there we had some money, he didn't send me that much but we had some money. Mr. Morelli said, "We'll just spend it to pick up the tab."

Again, on the matter of the telephone call(s) from Florida to Michigan, Hutton's testimony differs just slightly from Luca's. Hutton remembered the conversations with Luca about traveling expenses and with Morelli about the narcotics deal as occurring during the same phone call. Hutton's testimony did confirm, however, that he sent a wire money order for $200 to Luca in Miami, and that a telephone conversation with Luca and Morelli preceded the sending of this money. Hutton testified:

Q What circumstances resulted in your sending that money order?
A Pete Luca was in Florida, and he called me at home and needed some money for traveling expenses.
Q What was your response?
A At first I wasn't going to give it to him. I told him that was his problem.
Q And what did he respond to that?
A Well, they kept talking there and finally I agreed that I would send it down the first of the week.
Q Did you talk to anyone else other than Luca in Miami?
A Yes.
Q Who was that?
A At the same telephone conversation Morelli got on the phone and assured me that everything was all right, that I was going to get my money back and to go along with these guys, meaning Misko, Luca and LaPuma.
Q Did you recognize that as being the voice of Mr. Morelli?
A Yes.

Hutton's testimony was supported by government exhibit 44A, a Western Union telegraphic money order receipt for $200 and a $7.90 service charge.

II.

In his brief on appeal, Morelli outlines four claims of error as grounds for reversal:

I. A CALL TO MICHIGAN REQUESTING EXPENSE MONEY FOR A FLORIDA VACATION AND THE RESPONSE IN THE FORM OF A $200 WESTERN UNION MONEY ORDER WHICH WAS USED FOR VACATION EXPENSE MONEY WERE NOT SUFFICIENTLY RELATED TO ANY SCHEME OR SCAM TO BRING THE ACTIONS WITHIN THE WIRE FRAUD STATUTE.

II. THE REQUEST FOR FUNDS FROM FLORIDA AND THE RESPONDING WESTERN UNION MONEY ORDER DID NOT ESTABLISH THAT DEFENDANT WAS INVOLVED IN A PATTERN OF RACKETEERING ACTIVITY AS THAT TERM IS DEFINED IN 18 U.S.C. § 1961(5).

III. DEFENDANT MAY NOT BE CONVICTED ON RICO CHARGES WHERE THE GOVERNMENT FAILED TO ESTABLISH THE NECESSARY ELEMENTS FOR THE TWO PREDICATE WIRE FRAUD COUNTS AND THE TWO WIRE FRAUD COUNTS CONSISTING OF A REQUEST AND RESPONSE FAIL TO ESTABLISH A PATTERN UNDER TITLE 18 U.S.C. § 1961(5).

IV. THE RICO STATUTE IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANT MORELLI.[5]

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[5] There also appears to be some inconsistency in the dates set forth in the indictment. The telephone conversations were alleged to have occurred on or about February 7, and the transmittal of money occurred or was shown to have occurred on or about February 6, whereas the proof at trial unequivocally showed that the telephone conversations preceded the transmittal of the money. Morelli did not make this an issue on appeal, but the court has considered it *sua sponte*. This apparent inconsistency was not fatally defective to the indictment. In each instance, the language of the indictment recited that the particular activity was "on or about" the date specified. This type of pleading has long been practiced because, unless a particular date

We have described in some detail the nature of the enterprise in which Morelli and his associates were involved because this description, more than any legal argument, fully demonstrates Morelli's deep involvement in the enterprise as a whole, and his guilt of the two predicate counts of wire fraud. Further, it demonstrates the connection of the telephone conversation and Hutton's subsequent act of wiring the money to the overall scam involving Hutton.

There seems to be some disagreement as to the number of telephone calls made, Luca remembering two and Hutton remembering only one coming to him from Morelli and Luca in Miami. Several years, of course, had elapsed between the dates of the occurrences in question and the testimony of the witnesses and it is indeed not at all surprising that some discrepancy should occur. This, of course, bore upon the credibility of the witnesses, but the discrepancy itself cannot be viewed as fatal in the context of this case. The actual sequence of events, by the testimony of the witnesses, was altogether clear, whatever the dates. There was ample evidence for the jury to have found beyond a reasonable doubt that, though there may have been some confusion in the actual dates, there was never any reasonable doubt that the telephone conversation and the mailing of the money did, in fact, occur and that the money was mailed as a result of the telephone conversation. There is likewise no showing of any surprise or any other prejudice to the defendant in the presentation of his defense.

Two separate acts were shown. The evidence clearly shows that they were related to the continuing efforts of Morelli and Luca to extract further cash from Hutton as part of their

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is made material by the statute creating the offense, the statute of limitations, or any evident prejudice that would come to the defendant by the lack of the actual date, the exact date upon which the offense was committed is not crucial. *See Ledbetter* v. *United States*, 170 U.S. 606, 612 (1898); *United States* v. *Antonelli*, 439 F.2d 1068 (1st Cir. 1971).

ongoing scheme to defraud him. That they achieved only limited results and that they applied the funds to their own pleasure does not detract from the fact that the purpose of the call was to advance their overall fraudulent scheme, and to retain Hutton's interest in getting his money back by going along with the request for further money. In short, the evidence was altogether ample, that both the telephone call from Morelli and Luca to Hutton and the act of wiring the money were two separate activities which were a part of the pattern of racketeering activity as that term is defined in 18 U.S.C. § 1961(5) (1976). That Hutton himself sent the money, and that Morelli and Luca did not, is immaterial to the question of Morelli's guilt of having by his conduct brought about that act. *United States* v. *Conte*, 349 F.2d 304 (6th Cir.), *cert. denied*, 382 U.S. 926 (1965).

III.

As indicated in section II, Morelli contends that the RICO statute is unconstitutionally vague as applied to his conduct in this case. At the same time, Morelli's counsel acknowledge that the RICO statute itself has survived various void-for-vagueness challenges. *See United States* v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States* v. *Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States* v. *Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied sub nom. Crancich* v. *United States*, 423 U.S. 1050 (1976); *United States* v. *Thevis*, 474 F.Supp. 134 (N.D. Ga. 1979) (as applied); *United States* v. *Chovanec*, 467 F.Supp. 41 (S.D.N.Y. 1979); *United States* v. *Stofsky*, 409 F.Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

In his brief, Morelli's counsel employ Luca's testimony to describe Morelli's role:

> He was our man. He was the one that if we ever had to use a name, for any influence or any problem supposedly, if anybody gets uptight like Mr. Hutton and we said we represented the Mafia and they wanted to check us out, we could say, "Check with Mr. Morelli or the Giacalones," and we could use their names to get that influence, and that's the only reason we could get the money, because otherwise if we couldn't use their names, we wouldn't have the reputation they had.

As if Morelli were simply to serve as a vague background "enforcer" who himself never participated, his counsel now seek to claim that the statute would be vague as to him because the government never showed that he in fact ever participated in the conduct of the enterprise. Morelli was, however, found guilty of two predicate counts of wire fraud that were part of a pattern of racketeering activity. It is true that, perhaps from an abundance of caution, Judge Freeman dismissed the substantive extortion counts because in his view the government lacked probative evidence showing that Morelli knowingly allowed his name and supposed Mafia connections to be used as a means to coerce payment of the various debts. This ruling did not, however, dismiss the conspiracy count. Therefore, the testimony of Luca concerning the pattern of activity engaged in by the co-conspirators during the course of the conspiracy of which Morelli was a controlling member was in our judgment altogether admissible. This evidence clearly showed that the collection of an illegal debt was also a part of the enterprise.

IV.

Morelli's claim that he was denied due process in that the RICO charge relating to the collection of an illegal debt

resulting from the Vervane game was filed so long after the incident that he was unable to properly prepare his defense is without merit. In *United States* v. *Lovasco*, 431 U.S. 783 (1977), the Supreme Court held that in cases alleging improper pre-indictment delay, the reasons for the delay must be examined as well as any prejudice to the defendant. Here, Morelli makes an assertion of prejudice without presenting any facts that would support this claim. Neither does Morelli attribute any improper motives to the government in its delay in bringing this charge. Given the relatively successful nature of the parties' activities over a long period of time, it is not unlikely that the government lacked probable cause to bring the charge prior to the time it did so. Morelli should not now be allowed to benefit from any delay caused by the secrecy in which he operated.

We also find no merit in Morelli's claim that he was subject to cruel and unusual punishment in violation of the Eighth Amendment because he was sentenced to fifteen years for "obstensibly [sic] the same conduct" as that proscribed by the two wire fraud violations for which he received five years each. Morelli's reliance on *Downey* v. *Perini*, 518 F.2d 1288 (6th Cir.), *vacated and remanded*, 423 U.S. 993 (1975), as authority for his claim is altogether inappropriate. Congress may constitutionally make the commission of two crimes within a specified period of time and within the course of a particular type of enterprise an independent criminal offense punishable more severly than simply twice the penalty for each constituent offense. *United States* v. *Field*, 432 F.Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

Morelli could have been sentenced to a total of ten years' imprisonment on the two wire fraud counts themselves, which involved only the scam on Hutton. In this light, the concurrent sentences here can in no way be construed as inappropriate and excessive for a continuing series of fraudulent activi-

ties engaged in over a period of several years in which Morelli was a high level figure.

Although not raised by the appellant, the government in defensive anticipation urges that RICO is not inapplicable under the facts in this case because it failed to allege the existence of a legitimate enterprise. This apprehension was clearly prompted by the original panel decision to that effect in *United States* v. *Sutton*, 605 F.2d 260 (6th Cir. 1980). That decision, of course, has since been vacated and superseded by the *en banc* decision of our circuit in *United States* v. *Sutton*, — F.2d — (6th Cir. 1980), holding that there is no statutory requirement under RICO that the enterprise referred to in the Act be legitimate.

Affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Civil
No. 7-80601

v.

RONALD MORELLI and
CURTIS TURBYFILL, ET AL.,

Defendants.
_____/

MEMORANDUM OPINION

On July 21, 1978, a jury found the defendant Curtis Turbyfill guilty of Count 1 of the indictment charging a violation of 18 U.S.C. § 1962(c) which reads as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Mr. Turbyfill was also found guilty of the offense charged in Count 2, a conspiracy to violate 18 USC § 1962(c).

There are two ways that a person's acts may constitute a violation of 18 U.S.C. 1962(c). The first is by participating in the affairs of an enterprise through a pattern of racketeering. A pattern of racketeering activity requires the commission of at least two of the predicate crimes set forth in 18 U.S.C. § 1961(A). The second way a person may violate § 1962(c) is by participating in the affairs of an enterprise through the collection of unlawful debt, as defined by 18 U.S.C. § 1961(c).

Counts 3 through 10 of the indictment contained charges relating to various crimes which the defendants were alleged to have committed and which formed the alleged pattern of racketeering activity. Counts 3, 4, and 5 alleged various violations of the wire fraud statute 18 U.S.C. §1343. Counts 6, 7, 8 and 9 alleged the use of extortionate means to collect an extension of credit

in violation of 18 U.S.C. § 894, and Count 10 alleged travel in interstate commerce to promote racketeering activity in violation of 18 U.S.C. § 1952. The defendant Turbyfill was specifically charged in Counts 3, 4, 7 and 8. Count 1, however, also charged him with committing the crimes set forth in Counts 6, 9 and 10, as part of a pattern of racketeering activity. Count 1 also charged the defendant Turbyfill with participating in the affairs of the enterprise through the collection of unlawful debt.

The evidence at trial demonstrated the existence of an enterprise whose major purpose was to involve persons in rigged gambling games and collect the gambling debts thus created, sometimes by the use of extortion. The government offered proof of five instances where rigged gambling games were followed by debt collection and extortion. Two of these instances dealt

with one Charles Wicks who the evidence shows was the victim of rigged card games in Warren, Ohio and Chester, West Virginia, both of which gave rise to unlawful debts. Counts 7 and 8 charged that these debts were collected by the use of extortionate means in violation of § 984 [sic]. The evidence also showed that Gordon Glaser and Kenneth Pichette were victims of rigged card games which gave rise to gambling debts. Counts 6 and 9 of the indictment alleged that these debts were collected by the use of extortionate means in violation of § 894. In addition to alleging that the offenses charged in Counts 6 through 10 were part of a pattern of racketeering, Count 1 alleged that the mere non-extortionate collection of these debts also violated § 1962(c). Finally, Count 1 alleged the collection of an unlawful debt from one Edward Vervane in violation of § 1962(c).

Counts 3, 4 and 5 of the indictment, charging wire fraud were also realleged in Count 1 as acts of racketeering. These acts of wire fraud were supposedly perpetrated on one James Hutton, the victim of several fraudulent schemes perpetrated by members of the enterprise.

At the close of the government's case, the Court dismissed Counts 3 and 4 against the defendant Turbyfill and held that the violations charged in those counts could not be used as predicate offenses under Count 1. The Court also held that Mr. Turbyfill could not be convicted of the offense charged in Count 1 on the basis of the collection of an unlawful debt from Vervane or the extortion charged in Count 6.

The jury returned a verdict of not guilty as to the defendant Turbyfill with respect to Counts 7 and 8, which alleged extortion of Charles Wicks. The jury did, however, return of verdict of guilty against

the defendant Turbyfill as to Counts 1 and 2 of the indictment.

The defendant has now moved for a new trial on several separate grounds, each of which the Court will now deal with.

The first ground alleged by the defendant in support of his motion is that, in light of the jury's verdict, the government failed to establish an essential element of the offense, that being that the enterprise was engaged in or its activities affected interstate commerce. The defendant contends that since he was not convicted of Counts 7 and 8 involving the extortion of Wicks, his conviction under Count 1 could not have been predicated on the violation charged in Count 10, since that count involved travel in aid of the same extortions of Wicks. He also argues that his conviction under Count 1 could not be predicated on the violation alleged in Count 9 because the evidence was insufficient to establish that the defendant was involved

in the extortion of Glaser. Thus, the defendant argues that his connection with crimes involving interstate commerce has not been established.

Whatever merit this argument may have, it completely misses the thrust of the interstate element of § 1962. Section 1962(c) requires, as the Court instructed the jury, that the government establish that the enterprise engaged in or its activities affected interstate commerce. Thus, the government had to show not that the defendant Turbyfill was involved in interstate commerce, but only that the enterprise was. In this case, the government relied on violations of 18 USC § 894 and 18 USC § 1952 to establish the interstate commerce element. Violations of § 894 affect interstate commerce even when they are purely intrastate in character. Section 201 of Pub. L. 90-321; United States v. Perez, 426 F.2d 1073 (2d Cir. 1970), aff'd 402 U.S. 146 (1971). Furthermore, violations of § 1952

by their nature involve interstate commerce. Therefore, the question is not whether the defendant Turbyfill violated these provisions, but is instead whether members of the enterprise committed such violations so that the enterprise could be said to have been involved in interstate commerce.

Assuming arguendo that the jury could not have found Turbyfill guilty of these violations of §894 and 1952, it does not follow that the jury could not have found that the enterprise was involved in activities which affected interstate commerce. There was substantial if not overwhelming evidence that other members of the enterprise, notably Peter Lucas, Thomas Misko, and Robert La Puma, committed the crimes alleged in Counts 6 through 10 of the indictment. Thus, the evidence clearly established the interstate nature of the enterprise.

Since Turbyfill does not contend that he was not a member of this enterprise or that the enterprise as alleged did not exist, it is clear that the interstate element required for his conviction under § 1962(c), was established regardless of whether or not he, himself, was involved in interstate commerce. As a result, his motion for a new trial on this ground is denied.

As a second ground for his motion, Turbyfill alleges that the government failed to prove "an enterprise with a pattern of racketeering activity." Essentially, he uses the argument outlined above to assert that the jury could not have found him guilty of any of the violations alleged in Counts 7 through 10. Thus, he reasons that the government failed to show that the enterprise engaged in a pattern of racketeering activity.

This argument must fail for two reasons. First, under 1962(c) there is no requirement

that the enterprise, as an enterprise, engage in a pattern of racketeering activity. Indeed, there is no requirement that a member of the enterprise engage in a pattern of racketeering activity since a conviction under § 1962(c) can be based solely on the collection of unlawful debt.

Second, even if this were a requirement for a conviction under § 1962(c), there is ample evidence, as noted above, from which the jury could have concluded that the enterprise and its members engaged in racketeering activity as defined by 18 U.S.C. 1961. As a result, the Court is of the opinion that the defendant's motion for a new trial on this basis must be denied.

At this point, the Court feels compelled to comment on the implicit assumption contained in the defendant's brief that because the jury found him not guilty of Counts 7 and 8 that he could not have been found guilty of Count 1. As a logical matter, it may

well be true that the verdict of not guilty on these two counts precluded a conviction under Count 1 based on the theory that Turbyfill engaged in a pattern of racketeering activity. This does not, however, mean that Turbyfill could not have engaged in the collection of unlawful debts as alleged in Count 1. A finding by the jury that Turbyfill did not use extortionate means to collect debts from Wicks as alleged in Counts 7 and 8, does not mean that the jury could not have concluded that he participated in the collection of these debts by means other than extortion. The collection of an unlawful debt as prohibited by 18 U.S.C. § 1962(c) does not require the use of a threat or extortionate means. Thus, a finding that Turbyfill did not use extortionate means to collect a debt from Wicks as alleged in Counts 7 and 8 is not inconsistent with a finding that he participated in the collection of these debts by use of non-extortionate means.

In addition, the defendant claims that there was not sufficient evidence that he participated in the collection of unlawful debts from Glasser and Pichette. Turbyfill appears to contend that since neither Pichette nor Glasser identified him, he could not be convicted of collection unlawful debts from them. Despite this, Peter Luca testified that Turbyfill knowingly played in a rigged card game with Pichette and accompanied Luca on several occasions when the debt created in that game was collected.

As to Mr. Glasser, Luca testified that Turbyfill knowingly participated in a rigged card game which gave rise to a $2,000 debt. He further testified that Turbyfill participated in conversations regarding the collection of this debt and that he, Luca, eventually obtained the $2,000 in question from Glasser.

This evidence would constitute substantial evidence upon which Turbyfill could be

be convicted of the substantive offense of collecting an unlawful debt, either as the result of the actual collection of the debt or as the result of participation in a conspiracy,[1] the purpose and foreseeable result of which was the collection of these debts. See Pinkerton v. United States, 328 U.S. 640 (1945).

A finding that this evidence constitutes substantial evidence, however, does not end the Court's inquiry. On a motion for a new trial:

> the Court may weigh the evidence and consider the credibility of witnesses. If the Court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. United States v. Robinson, 71 F. Supp. 9, 10 (D. D.C. 1947).

1/ Charged in Count 2 of the indictment.

This authority should be exercised with caution and "should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." Id. at 10-11.

Here the Court is of the opinion that the evidence does not preponderate heavily against the jury's verdict. The fact that Glaser and Pichette did not recognize the defendant is, of course, an appropriate consideration on this motion. However, when the amount of time between the trial and the events testified to is considered, this failure to identify the defendant is understandable. In addition, the Court considers the testimony of Peter Luca to be reliable. His memory of distant facts was fairly detailed and was corroborated in many instances by other witnesses. As a result, the Court is of the opinion that his testimony outweighed that of Glaser and Pichette. The defendant's motion for a new trial on this basis is therefore denied.

As to Count 2, Mr. Turbyfill maintains that he is entitled to a new trial for essentially the same reasons as have been dealt with under Count 1. The Court has already found those reasons to be without merit, and therefore the defendant's motion for a new trial as to Count 2 based on these grounds is denied.

In addition, the defendant contends that the government failed to prove the intent required for a conspiracy conviction. This contention is without merit. Without detailing all the evidence in the record, the Court concludes that there was overwhelming testimony regarding Turbyfill's knowing and willing participation in the concerted activity in pursuance of a common objective which constituted the conspiracy charged in the indictment. See United States v. Brown, 555 F.2d 407 (5th Cir. 1977).

Finally, Turbyfill contends that he was prejudiced by the Court's failure to instruct the jury that the statements of James Hutton

could not be used against him. Turbyfill's concern apparently stems from the fact that the jury, shortly before reaching its verdict, requested guidance from the Court regarding whether they could find the defendant guilty of collecting an unlawful debt from James Hutton. Inasmuch as the testimony showed that no unlawful debts were collected from Hutton, the Court instructed the jury that it was not the government's theory that any such debts were ever collected from Hutton.

As a result, the Court sees little merit in the defendant's contention. Although the Court's written charge, as submitted to the jury, did not contain an express statement that no unlawful debt was alleged to have been collected from Hutton, it did specifically state that the jury could consider only the alleged unlawful debts of Wicks, Pichette and Glaser in reaching a verdict. This, coupled with the later oral instruction that Hutton was not to be considered

in connection with the collection of unlawful debts, clearly made the jury aware of the evidence to be considered in reaching its verdict.

In addition, the defendant's argument that the Court should have instructed the jury that none of Hutton's testimony could be used to convict the defendant is without merit. As originally constructed, the indictment charged the defendant and other members of the enterprise with violations of § 1343, the wire fraud statute in connection with various fraudulent schemes perpetrated on Hutton. Although the wire fraud counts were eventually found to be inapplicable to to Turbyfill, the testimony regarding his participation in these schemes to defraud Hutton was relevant to a determination of Turbyfill's guilt. The reason for this is that it helped establish that Turbyfill was a member of the enterprise and that the enterprise engaged in activities which affected interstate commerce, both essential elements

under § 1962(c) and (d).

In addition, Turbyfill claims that the jury charge, "though an excellent one, when given directly, verbally, to the jury, leaves something to be desired when reduced to writing and taken to the jury room for their consideration." This argument seems curious in light of the colloquy between the Court and Mr. Hertzog, Turbyfill's attorney, following the Court's charge:

> THE COURT: Are there any objections or exceptions to the charge of the Court? First I call on the Government.
>
> MS. KATZ (for the Government): No, your Honor.
>
> THE COURT: Thank you. I call on the Defendants.
>
> MR. HERTZOG: May it please the Court, although I haven't had much experience in criminal matters I wish to compliment the Court on that charge.
>
> THE COURT: Thank you.

MR. HERTZOG: After consideration of all of the discussions we had regarding proposed charges and everything I think that that charge was a work of ar.

THE COURT: Thank you.

MR. HERTZOG: I want to compliment your Honor. I, of course, have no objection to it.

THE COURT: All right. Thank you very much.

Furthermore, the defendant has pointed to no reason why the words of the jury charge lose their excellent character when reduced to writing. In view of the complexity of the case, the Court is of the opinion that it was a proper exercise of its discretion to submit the charge to the jury. See United States v. Blane, 375 F.2d 249 (6th Cir. 1967).

For the reasons stated above, the defendant's motion for a new trial is denied.

/s/
RALPH M. FREEMAN
United States District Judge

Dated: November 2, 1980